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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONNA ERICKSON,

Petitioner,

vs.

PIERCE COUNTY and JOHN LADENBURG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Published Opinion Of The Ninth Circuit In The Instant Case Substantially Limited The Kinds Of Circumstantial Indicia Of Unlawful Motions In Cases Where Public Employee's Have Alleged That Their Employment Was Terminated For Reasons Violative of First Amendment Rights?

2. Whether The Supreme Court Will Examine And Clarify What Kinds and Quantities of Circumstantial Evidence Must Be Produced In Order to Sustain A Jury's Verdict That A Public Employee Has Been Terminated For Unlawful Reasons.

3. Did the Ninth Circuit Misapply The Standards For Granting Judgment Notwithstanding The Verdict By Reweighing the Evidence and Ignoring Competent Circumstantial Evidence Upon Which The

Jury Could Have Rested Its Verdict?

4. Was Petitioner Denied Her Seventh Amendment Right To A Jury Trial By the Circuit Court's Reversal of The District Court's Denial Of A Motion For JNOV?

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NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

DONNA ERICKSON,

Petitioner,

vs.

PIERCE COUNTY and JOHN LADENBURG,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner Donna Erickson respectfully prays that a certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The decision of the Court of Appeals

for the Ninth Circuit as amended is reported at 960 F2d 801 (9th Cir. 1992) and reproduced as Appendix 1.

STATEMENT OF JURISDICTION

(i) The decision of the Court of Appeals denying rehearing was issued on July 1, 1992. See Appendix 2.

(ii) Jurisdiction is conferred on this Court by 28 USC Sec. 1254(1) and 28 USC Sec. 2101(c). This petition is timely under the terms of Superior Court Rule 13(4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution and 42 USC Sec. 1983, the pertinent text of while are set forth in

Appendix 3.

STATEMENT OF THE CASE

A. Procedure

Petitioner Donna Erickson brought this action under 42 USC Sec. 1983 against Pierce County and its elected prosecutor, John Ladenburg under 42 USC Sec. 1983, alleging that Ladenburg violated her civil rights by terminating her employment with the Pierce County prosecutor's office for reasons violative of her First Amendment rights.[1] Erickson claimed she had been

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[1]Other claimed violations were alleged including the denial of a property interest in her employment protected by the due process clause of the Fourteenth Amendment and that the manner in which the termination occurred denied her due process protected liberty interest. These claims were summarily dismissed by the

terminated from her employment because she was a political supporter of a William Griffies, Pierce County's former prosecutor who had been defeated by Ladenburg in a 1986 election.

After the denial of several summary judgment motions, the First Amendment (patronage claim) was tried with a jury before the Honorable Jack E. Tanner of the Western District of Washington at Tacoma. On March 20, 1989, the jury returned a verdict in petitioner's favor for $25,000.00. On April 28, 1989, the District Court ordered aa new trial limited to the issue of damages.

On January 2, 1990, a trial limited to damages was held. The jury returned a $75,000.00 verdict. In addition the

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District Court and are not the subject of this petition.

District Court awarded $109,925.50 in prevailing party attorney's fees pursuant to 42 USC Sec. 1988 and $5,992.84 in costs.[2] A timely Notice of Appeal was filed by Respondents.

B. **Facts.**

Donna Erickson was employed in the office of the Pierce County Prosecutor for approximately seven years. She began in June of 1980 as a records coordinator during the administration of a Don Herron, a democrat. She was promoted by him to the position of his administrative assistant. During this early stage of career on the personal side of her life she had become romantically involved with a local attorney named William Griffies.

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[2]Respondent's post-trial motion for a jury notwithstanding the verdict was denied.

By pure coincidence in 1982 William Griffies, a republican, was elected as Pierce County's prosecuting attorney. Mr. Griffies asked Ms. Erickson to maintain her role as his administrative assistant.

In 1986, Mr. Griffies lost his bid for reelection to John Ladenburg, a democrat. As part of Griffies unsuccessful campaign for reelection, Petitioner helped in his campaign by handing out literature, doorbelling and working at the republican party headquarters. She accompanied Griffies to rallies where both candidates were present. It was undisputed that Petitioner was a person closely identified both personally and professional with Griffies.

After his defeat, Griffies was concerned for Petitioner's job security.

To address these concerns, he transferred Ms. Erickson to a non-confidential and non-policy-making position within the offices Child-Support Enforcement department as a legal interviewer.

The transition from the Griffies administration to Ladenburg's was very difficult because Griffies refused to aid in the transition. Prior to taking office, Ladenburg was aware of the Erickson-Griffies relationship and had attended at least one "political meeting" with representatives of a potential key constituency (the Sheriff's Office) wherein Petitioner was a subject of discussion. Ladenburg recalled the attorneys for the Sheriff's Office had a negative appraisal of Ms. Erickson.

Once Ladenburg assumed office, he sought out Petitioner to assume limited

administrative assistant functions until he hired his own assistant. She also was to continue performing her regular job duties. At time of trial it was disputed as to whether Petitioner did or did not adequately or completely perform the requested duties. Shortly after Ladenburg hired his own administrative assistant and Petitioner's services were no longer essential, he terminated Petitioner's employment.

The reasons for termination related to Ms. Erickson's performance of administrative assistant functions and not those of her regular job duties as a legal interviewer. He gave her two weeks notice in advance of her final day on the job. Prior to termination, Petitioner had consistently received merit raise increases and annual evaluations with the

highest possible scores.

At the time of the first trial, both Ladenburg and Erickson testified about the events leading up to her discharge. The jury was duly instructed that Erickson had the burden of proving, her political beliefs and support was "a motivating factor" in the discharge decision. Based on the evidence before it and its determination of credibility issues, the jury found in Erickson's favor.

C. **The District Court's Decision.**

The District Court denied Respondents' motion for judgment notwithstanding the verdict and allowed the jury verdict finding Respondents liable for violating Petitioner's First Amendment rights to stand.

D. **The Court of Appeals' Decision.**

The Court of Appeals reversed and

held that Petitioner had failed to establish that her political support of Griffies was a substantial or a motivating factor in Ladenburg's decision to terminate her thus the District Court erred by not granting Respondents' motion for judgment notwithstanding the verdict.

In its opinion, the Appellate Court took at face value the alleged legitimate grounds for termination, but noted, "Erickson disputes the reasons cited by Ladenburg. She contends that her employment was terminated solely because she had supported Griffies during the 1986 election". After providing legal analysis of Petitioner's claim, the Court examined the circumstantial evidence presented by Petitioner yet in its conclusion denied Petitioner the benefit of the inference that could be derived therefrom:

> It is well established that a plaintiff need not prove allegations with direct evidence and that circumstantial evidence can be sufficient, U.S. Postal Serv. Bd. of Governor's v. Aikens, 460 U.S. 711, 716-17 (1983). Nonetheless, all of the above evidence merely suggests that Erickson was a Griffies supporter who was terminated, not that she was terminated because she was a Griffies supporter.

This conclusion was reached despite evidence relating to Petitioner's past superior performance, the temporal relationship of events, the attitude and relationship between the parties, and the underlying circumstances leading up to the termination. Apparently, the Court found it compelling that Petitioner, a non-lawyer, was unable on cross-examination to articulate how the circumstantial evidence related to her legal claim.

Petitioner sought rehearing and suggested en banc review. On July 1, 1992, the petition for rehearing was

denied and suggestions for a rehearing en banc was rejected. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Ninth Circuit Conflicts With The Decisions Of This Court, Its Own Opinions And That Of Other Circuits and This Case Presents An Important Question Concerning The Quality And Kinds of Circumstantial Evidence Available To A Public Employee Who Has Allegedly Been Terminated By Her Public Employer For Reasons Violative Of Her First Amendment Rights.

The instant matter was the most basic of jury cases in an area of the law where the Ninth Circuit and other federal courts

have repeatedly found that the ultimate issues of fact are for a jury to resolve. See e.g. Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987); Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982). In the past it has been recognized that when an employer's unlawful motive is at issue, the aggrieved employee may prove his or her case by both direct and circumstantial evidence. See U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711, 716-17 (1982). The liberal allowance for the use of circumstantial evidence is due to the self-evident proposition that unlawful motives are seldom admitted. See Missouri Education Association v. New Madrid County R-1 School Dist., 810 F.2d 164, 167 (8th Cir. 1987). See also, City of Monrovia, 775 F2d 998, 1008-09 (9th Cir. 1985) (Issue of employer's motivations a pure

question of fact).

While the Circuit Court's opinion at page 805 recognizes these basic propositions, its factual analysis and conclusions therefrom has the affect of sub silentio overruling a vast body of precedent that previously provided guidance for the practitioner and consistency in the manner in which such cases are proved at time of trial.

The Petitioner's case rested on the proposition that her employment was terminated due to her political beliefs in violation of her First Amendment rights. See, Elrod v. Burns, 427 U.S. 347, 359 (1976). The basis for the reversal of the jury verdict and dismissal of the case was that she failed to prove that such beliefs were "a substantial or a motivating factor" in the discharge decision. See,

Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977). It cannot be disputed that this particular question of motivation is a factual issue. Gillette v. Delmore, 886 F2d 1194, 1197 (9th Cir. 1989). Yet, in reversing the jury's verdict, the Circuit Court at 805 simply dismisses evidence that previously has been found probative in other cases and sufficient to create a jury question as to the issue of motivation.

It has long been recognized that the temporal relationship between protected activity and an adverse employment decision in and of itself is sufficient to create a jury question as to retaliatory motivations. See, Schwartzman v. Valenzuela, 846 F2d 1209, 1212 (9th Cir. 1988); Yartzoff v. Thomas, 809 F2d 1371, 1376 (9th Cir. 1987). In the instant

case, the Circuit Court at page 805, notes the evidence established that shortly after assuming office and his hiring of a person who could perform the basic functions that Erickson was performing, Erickson's employment was terminated. It is suggested that it was within the jury's prerogative to believe that as soon as it became reasonably convenient following her protected activities, Ladenburg eliminated her employment. Is it now to be understood that this form of evidence is no longer available to person's subject to an unlawful employment decision.

It was clear from the record below that Erickson was viewed as a quality employee who in the past had been consistently promoted and had received superior performance ratings. In Schwartzman, supra, and other cases, it

has been recognized that it is "strong circumstantial evidence" that a retaliatory motive is operating when a previously well respected employee is terminated after engaging in protected conduct. See also, Grafenhain v. Pabst Brewing Co., 827 F2d 13, 22 (7th Cir. 1987). Are we now to understand that an employee's past superior performance is no longer a relevant consideration when engaging in a motivational inquiry?

As noted in Grafenhain, at page 20, when indirect proof is being utilized no one pierce of evidence alone need support a finding of unlawful intent, but rather the entire circumstances must be viewed as a whole. Beyond the facts above, the record in the instant case is literally replete with other circumstantial evidence of unlawful motive that apparently were

dismissed as insignificant by the deciding panel.

In the instant case, Ladenburg was aware of Erickson's protected conduct and of her close personal and political affiliation with his political rival. See, Cohen v. Fred Meyer, 686 F2d 793, 797 (9th Cir. 1982). Ladenburg admitted that Erickson was a subject of discussion with representatives of a politically key constituency, the local sheriff's office, who had a negative opinion of Erickson. The transition between Ladenburg and the defeated incumbent, who Erickson was closely identified with, was not friendly. Ladenburg conceded that any problems he may have had with Erickson was the by-product of the "emotionalism" of the election (assuming the jury believed he had any "problems" with her). Ladenburg

fired Erickson without consulting her direct supervisors and without evaluating her performance in the job she was then assigned to perform. Erickson received no notice of performance deficiencies prior to termination and at trial it was within the jury's prerogative to believe that the "reasons for termination" were nonexistent or trivial.

When analyzing such facts in relation to existing case law, it is clear that they have in the past been deemed sufficient to support submitting a case to a jury. The panel's opinion is a radical departure from precedent. In Laidley v. McClain, 914 F2d 1386 (10th Cir. 1990), another political termination case the Court found sufficient facts to support a claim where the evidence showed that the plaintiff therein was a supporter of a

political opponent who, after a bitter election campaign was fired by the winning candidate even though she had previously been an above average employee with no disciplinary history. The Laidley case at 1394 noted that all the circumstantial evidence had to be viewed in the context of a bitter political campaign. In other words, it is significant and entirely proper for a fact finder to consider the atmosphere in which the termination decision was made. See also, Conway v. Electro Switch Corp., 825 F2d 593, 600 (1st Cir. 1987). In the instant case, it was entirely proper for the jury to view the surrounding circumstances and determine that more likely than not Erickson was a victim of politics and that her termination was predictable.

Ladenburg's view of Erickson and his

attitude towards her are also significant factors overlooked by the Court. See, Meyers v. City of Cincinnati, 934 F2d 726, 729 (6th Cir., 1991). In Ladenburg's view he had a "problem" with Erickson because of the "emotionalism of the election" while Erickson testified she performed all the tasks she was asked to perform. Ladenburg also indicated he kept Erickson under scrutiny when, at a staff meeting, he was introducing new policies. See, Mays v. Williamson and Sons Janitorial Services, Inc., 775 F2d 258, 259 (8th Cir. 1985).

In the similar political termination case of Soderbeck v. Burnett County, Wis., 752 F2d 285 (7th Cir. 1985), the Court found the relationship between the fired employee and the defeated political candidate sufficient to create a jury

question. In that case there was a marital relationship. In this case it was a long-term romantic relationship. In these modern times this would not seem to be a distinction that should make a difference.

The manner and so-called reasons for Erickson's termination were also probative of whether or not her dismissal was based on an improper motive. In Walther v. Lone Star Gas Co., 952 F2d 119, 124 (5th Cir. 1992), the Court noted that, as in the instant case, a jury would be entitled to find a termination decision suspect when the employee's personnel file was not examined and his immediate supervisor not consulted by the person who made a termination decision. Further, it has been found that when a long-time employee is terminated for what are arguably

trivial or minor infractions of work rules, it is for the jury to determine underlying motive. See, Hudson v. Normandy School Dist., 953 F2d 410, 413 (8th Cir. 1992).

In the instant case, the so-called reasons for termination were such petty and amorphous offenses as poor attitude, moving phone lines and files, poor performance in duties she was not being paid to perform, and causing morale problems. As noted at page 804 of the Circuit Court's opinion, Erickson disputed the legitimacy of Ladenburg's so-called reasons and as discussed below, it was the province of the jury to assess credibility and after determining these so-called legitimate reasons were pretextual, conclude Erickson's political beliefs were

the true reason for termination.[3]

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[3] At 805, the panel notes Erickson was contending she was terminated "solely" because of her political beliefs. This term is repeated at page 3052 of the opinion. This is not the standard that has been applied by the Circuit Courts in First Amendment political termination cases nor an accurate reflection of Erickson's contentions. See, Jones v. Dodson, 727 F2d 1329 (4th Cir. 1984); Thomas v. Carpenter, 881 F2d 828 (9th Cir. 1989). As these cases indicate, when a case involves contentions of potentially legitimate and illegitimate reasons for termination, it is a "mixed motive" case and "a substantial or a motivating factor" test applies. See, Price Waterhouse v. Hopkins, ___ U.S. ___ 1095 Ct. 1775 (1989). As shown by Price Waterhouse at

As noted in the recent opinion of Giacoletto v. Amax Zinc Co., Inc., 954 F2d 424, 425-26 (7th Cir. 1992), there are several methods of proving whether an employment decision has been predicated on an improper motive. On application of a

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page 1787-91, such a burden of proof is significantly lower in that a plaintiff does not have to show a single impermissible reason was determinative, but rather a plaintiff need only show an impermissible reason played a part in the adverse decision. It is respectfully suggested that to the degree a "sole reason" analysis was applied by the panel, it was erroneous and served to improperly heighten Plaintiff's burden of proof. It is further suggested that such language is bound to create confusion that will require clarification in the future.

pretext analysis to the facts of the instant case, it can be noted that once reasons for termination are placed into dispute, plaintiff can prove their case by showing that the decision more likely than not was based on an improper reason or that the proffered reasons are unworthy of credence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Such an inquiry largely rests on the credibility of the employer's explanation for its actions. See, Burdine at 256.

Should the reasons for termination be subject to rebuttal, the decision remains unexplained and it can be presumed that more likely than not it was based on an improper motive. See, Grafenhain v. Pabst Brewing Company, 827 F2d at 18. When untrue reasons are offered, an employee

may prove pretext by attacking the employer's motive for offering untrue reasons. Tye v. Polaris Joint Voc. Sch. Dist., 811 F2d 315, 319 (6th Cir. 1987).

It is disturbing the panel in its opinion emphasized Ladenburg's reasons for termination while ignoring Erickson's proof. It was the prerogative of the jury to conclude the so-called reasons for termination were false and were created as a subterfuge to cloak unlawful motivations. As shown by Anthony v. Sundlun, 952 F2d 603, 606 (1st Cir. 1991), Ladenburg's self-serving denials of impropriety should not be credited when a fact finder has considered such assertions and rejected them. As noted in Anthony, it is improper for an appellate court to disturb a verdict based on credibility made by a fact finder. On examination of

the standards applicable to the granting of a judgment not withstanding a verdict, it was clearly improper for the Court to disturb a jury verdict based on an assessment of credibility and the circumstantial evidence discussed above.

2. The Opinion Of The Circuit Court Misapplied The Standards For Granting Judgment Not Withstanding The Verdict And Violated Petitioner's Seventh Amendment Right To A Jury Trial.

The standards for the granting of a judgment notwithstanding the verdict are set-forth in Garvin v. Greenback, 856 F2d 1392, 1396 (9th Cir. 1988).[4] On

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[4] The recognized standards for JNOV are co-extensive with the requirements of the Seventh Amendment to the U.S. Constitution. See, Connell v. Sears,

application of such standards the Appellate Court applies the same standard as the District Court and must construe the evidence in a manner most favorable to the non-moving party. Id. JNOV is proper only if the evidence taken as a whole can support only one reasonable conclusion

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Roebuck & Co., 722 F2d 1542 (Fed. Cir. 1983). (Due to the Seventh Amendment, a jury verdict must be given great difference). When Court supplants the fact finding function of a jury, the Seventh Amendment is violated. Baylis v. Traveler's Ins. Co., 113 U.S. 316 (1885); see also U.S. v. Lesher, 56 F2d 53, 54 (9th Cir. 1932). It is suggested that the panel's failure to either recognize Erickson's evidence or its reweighing of the evidence in the record offended the Seventh Amendment.

that the moving party is entitled to relief from the verdict. (Emphasis added). Id. Neither the District Court nor the Appellate Court on such a motion is not free to weigh the evidence or reach a result it finds more reasonable if the jury verdict is supported by substantial evidence. Id.

Substantial evidence is more than a mere scintilla; it is relevant evidence taken from the record as a whole which a reasonable mind might accept as adequate to support a decision under review. Verdegall Bros. Inc. v. Union Oil, 814 F2d 628, 631 (Fed. Cir. 1987).

When reviewing a grant of JNOV, the possibility that a reasonable jury may have found in favor of a non-moving party is all that is necessary before a JNOV will be overturned. Ortega v. Schramm,

922 F2d 684, 695 (11th Cir. 1991). JNOV should be cautiously and sparingly granted only when a court is certain that the evidence conclusively favors one party and reasonable men would not arrive at a contrary conclusion. Sifers Corp. v. Arizona Bakery Sales Co., 133 FRD 607, 608 (D. Kan. 1991). JNOV of a jury verdict is only appropriate when a manifest injustice were to result if the verdict were allowed to stand. Marley v. City of Allentown, 774 F.Supp. 343, 344 (E.D. Pa. 1991). Determination of issues of credibility is out of place when considering a motion for JNOV. Branch v. Ogilvy & Mather Co., 772 F.Supp. 1359, 1362 (S.D.N.Y. 1991). See also, Rinker v. County of Napa, 831 F2d 829, 831 (9th Cir. 1987). When a JNOV of a jury verdict is at issue, it must be presumed the jury followed the

instructions of the Court. Id. (The propriety of the instructions was not raised in this appeal).

In the instant matter a manifest injustice has been done to Donna Erickson. She presented her case to a duly instructed jury and it presumptively found in her favor on issues of credibility and the substantial circumstantial evidence that she was wrongfully fired. The Circuit Court effectively substituted its judgment on these issues for that of the jury by reweighing the evidence and heavily discounting the evidence favoring Erickson.[5] It failed to recognize

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[5] By quoting a small portion of Plaintiff's testimony where she could not point to any direct evidence of an improper motive, ignored the large amount of other testimony relating to the

previously acknowledged indicia of improper motive. While a jury could have concluded that Erickson was simply a Griffies' supporter who was fired, it also would be reasonable for a jury to conclude

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circumstances surrounding the termination coming from both Ladenburg and Erickson. By essentially requiring a plaintiff unschooled in the law, to articulate the evidence that obviously is locked within the mind of a defendant is tantamount to unfairly requiring a plaintiff to personally prove her case without the aid of arguments and interpretation by counsel. It requires her to prove her case by direct evidence. A direct evidence requirement that the Ninth Circuit Court itself recently rejected in Branch v. Tunnell, 937 F2d 1382, 1387 (9th Cir. 1991).

she was fired because she was a supporter of Ladenburg's political opponent. The evidence made it very possible for a jury to find in Erickson's favor and it can only be concluded that the facts were construed against her on a cold written record with the Appellate Court resolving all issues of credibility adversely to her position.

The decision of the panel was unjust and unfair. It was not supported by the record before it and ignored well developed principles of law. It denied Erickson her Seventh Amendment rights by denying her a jury verdict supported by the evidence.

CONCLUSION

The opinion of the Ninth Circuit has substantially "muddied the waters" with regard to what kinds of circumstantial

evidence is available for victims of an unlawful termination from public employment. The published opinion either sub silentio overrules or calls into question literally dozens of Appellate Court and Supreme Court opinions addressing the kinds of circumstantial evidence available to prove that an employment decision was based on an improper motive. The opinion will create substantial confusion and serve to undermine predictability in an area of the law that was otherwise clearly established.

If the Ninth Circuit's opinion is allowed to stand unaltered, it will encourage government officials found liable for unlawful employment practices to appeal the sufficiency of jury verdicts based on circumstantial evidence. In a

macro-economic sense it has the potential of increasing defense driven costs of litigation. Prospects of post-verdict resolution will be undermined and justice delayed in an area where a plaintiff may have already suffered an interlocutory appeal. It can only serve to demoralize an already besieged civil rights plaintiff's bar.

The law affords jury verdicts some sanctity. The decision at issue did not. It is respectfully prayed that a writ of certiorari issues and that this case be subject to Supreme Court review.

Dated this 25th day of September, 1992.

Respectfully submitted,

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APPENDIX 1

Donna ERICKSON, Plaintiff-Appellee,

vs.

PIERCE COUNTY; John Ladenburg, Defendants-Appellants.

Donna ERICKSON, Plaintiff-Appellant,

vs.

PIERCE COUNTY, John Ladenburg, Defendants-Appellees.

Nos. 90-35212, 90-35228

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 6, 1992.

Decided March 27, 1992.

As Amended on Motion for Clarification

May 6, 1992

OPINION

HUG, Circuit Judge:

Erickson brought this action against Pierce County and her supervisor,

Ladenburg, alleging a claim for wrongful termination of her employment. The action was brought under 42 U.S.C. Sec. 1983. Erickson claims a violation of her constitutional rights under the First Amendment, asserting that her discharge was because of her political support for her former supervisor, whom Ladenburg had defeated in the election. She also claims that she was deprived of a liberty interest without due process because of damage to her reputation. The district court dismissed the due process claim on summary judgment, but permitted the First Amendment claim to go to the jury. Pierce County and Ladenburg appeal the judgment on the jury's $75,000 verdict and the award of $110,000 in attorney fees. Erickson cross-appeals the summary judgment on her due process claim. We

affirm the district court's summary judgment on the due process claim but reverse the judgment on the First Amendment claim. The district court jurisdiction is based on 28 U.S.C. Sec. 1343. Our appellate jurisdiction is based on 28 U.S.C. Sec. 1291.

The issues on appeal are (1) whether the jury verdict in favor of Erickson was supported by substantial evidence, and (2) whether the district court erred by dismissing Erickson's due process claim.

I.

Donna Erickson was employed in the office of the Pierce County Prosecutor for approximately seven years. She began as a records coordinator in June 1980, during the administration of Don Herron, but advanced to the position of administrative assistant in February 1981. She served in

that capacity throughout the term of William Griffies. Herron's successor. During the time Erickson worked as Griffies's administrative assistant, she maintained a personal relationship with him.

In 1986, Griffies ran for reelection against Ladenburg, and Erickson actively supported him during that campaign. Ladenburg, however, defeated Griffies in the election. When Ladenburg took office in January 1987, Erickson was still employed at the prosecutor's office. However, Griffies had moved Erickson to a position in the family support unit to provide her with more job security once Ladenburg took office. Griffies sought to ensure that Erickson would have continued employment with Pierce County when his tenure expired. At the time of the move,

Ms. Erickson was earning a $37,000 salary, which she retained after she changed jobs.

The transition from Griffies's administration to Ladenburg's was very difficult. Griffies refused to participate in efforts to coordinate the transition, and Ladenburg had to take office with no knowledge of day-to-day operations. To ease the transition, Ladenburg asked Erickson to help with the functions she had performed while working for Griffies. These services included signing on new employees, ordering supplies, assisting with payroll, and providing Ladenburg with employee lists and budget information.

According to Ladenburg, Erickson repeatedly failed to complete the tasks assigned to her and was openly critical of him in front of other employees.

Ladenburg also testified that Erickson had removed and kept files from the administrator's office without informing anyone that she had done so, had transferred the administrator's phone number to the office she used for her new job, and had taken and retained the checks and records from an account used by the prosecutor. In addition, Ladenburg received reports from other employees that Erickson was uncooperative and hostile towards the changes he was trying to implement.

In a letter dated March 6, 1987, Ladenburg terminated Erickson's employment. In the termination letter, Ladenburg cited the following reasons for his action:

1. Since January you have displayed a poor attitude toward

supervision by staff and have not fully cooperated in transition matters.

2. Transition work was hindered by your failure to properly list and register new employees.
3. Items such as extra hire lists and employee wage lists were not provided as requested or were incomplete.
4. The administrative offices had essential files and documents removed.
5. The phones for the administration offices were transferred, creating location problems.
6. You transferred to a position with lower responsibilities and yet kept your salary at a high

level that is unjustified for that position.

7. Your past position as administrative assistant and your relationship with employees causes continuing morale problems.

Erickson disputes the reasons cited by Ladenburg, she contends that her employment was terminated solely because she had supported Griffies during the 1986 election.

Erickson filed suit against Pierce County and Ladenburg in November 1987, asserting many claims, including violations of her First and Fourteenth Amendment rights. Prior to trial, all claims except the First Amendment claim were dismissed. Trial began on March 14, 1989. At the close of Erickson's case,

Pierce County moved for dismissal. That motion was denied. Pierce County renewed the motion after all parties had rested, but the second motion was also denied. The jury returned a verdict in favor of Erickson and awarded her $25,000 in damages. After the verdict was entered, Pierce County moved for judgment notwithstanding the verdict, and Erickson moved for a new trial on the issue of damages. The court denied Pierce County's motion, but granted Erickson's. The new trial on the issue of damages occurred on January 2, and 5, 1990, and the jury returned a verdict in favor of Erickson for $75,000. This appeal ensued.

II.

Pierce County claims that the evidence presented at trial was insufficient to support a verdict in

Erickson's favor. Challenges to the sufficiency of evidence, and the denial of a motion for judgment notwithstanding the verdict, are reviewed de novo to determine if the plaintiff's claims were supported by substantial evidence. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1013-14 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986). It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. Transgo, 768 F.2d at 1014; accord Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir. 1985) (directed verdict is "inappropriate if there is substantial evidence to support a verdict for the non-moving party"), cert. denied, 475 U.S. 1122 (1986).

Terminations that allegedly violate the First and Fourteenth Amendments are subjected to a three-part test to determine whether constitutional rights have been violated. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 247, 287, 97, S.Ct. 586, 576, 50 L.Ed.2d 471 (1977); Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989). First, the terminated employee must establish that the conduct at issue was entitled to constitutional protection. Second, the employee must prove that the constitutionally protected conduct was a substantial or motivating factor behind the termination. Third, once the terminated employee has established the first two elements, the employer must prove that it would have made the same decision to terminate even if the employee

had not engaged in the protected conduct. Mt. Healthy, 429 U.S. at 287, 97 S.Ct. at 576, Gillette, 886 F.2d at 1197. Although we find the first element of this test satisfied in the instant case, the second clearly was not. Consequently, we need not consider whether Ladenburg carried his burden of proving that he would have terminated Erickson even if she had not supported Griffies during the election.

Political association, by itself, is an insufficient reason to dismiss a public employee. Elrod v. Burns, 437 U.S. 347, 359, 96 S.Ct. 2673, 2687, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 515, 100 S.Ct. 1287, 1293, 63 L.Ed.2d (1980). Many Ninth Circuit cases have similarly recognized the impropriety of dismissing an employee for engaging in political conduct that is protected by the

First and Fourteenth Amendments. See Gillette, 886 F.2d at 1197; Thomas v. Carpenter, 881 F.2d 828, 830 (9th Cir.1989), cert. denied, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612, --U.S.--, 110 S.Ct. 3236 111 L.Ed.2d 747 (1990). Since Erickson's right to support Griffies during the 1986 campaign unquestionably is deserving of constitutional protection, the first element of the Mt. Healthy test was satisfied.

The second element of the Mt. Healthy test requires that Erickson prove that her political support for Griffies was a substantial or motivating factor behind Ladenburg's decision to terminate her. In an attempt to carry this burden, Erickson offered nine circumstantial reasons supporting her claim that she was terminated solely for her political

beliefs. Erickson's evidence consisted of the following nine disputed facts:

1. Erickson was romantically involved with Griffies, and Ladenburg was aware of their relationship.
2. The Pierce County Sheriff made a negative appraisal of Erickson at a political meeting with Ladenburg, which Erickson claims suggests political motives for her termination.
3. The transition between Griffies and Ladenburg was often not friendly.
4. Ladenburg terminated Erickson's employment shortly after Ladenburg hired his own administrative assistant.
5. Erickson never received a

warning prior to her termination.

6. Ladenburg did not approve of Griffies's decision to have a romantic relationship with an employee.
7. Ladenburg was insensitive to employee's right to disagree with his plans and policies for the prosecutor's office.
8. Ladenburg believed the problems between Erickson and him were a byproduct of the emotionalism of the election.
9. Ladenburg terminated Erickson's employment without advance notice.

It is well established that a plaintiff need not prove allegations with direct evidence and circumstantial

evidence can be sufficient. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17, 103 S.Ct. 1478, 1482-83, 75 L.Ed.2d 403 (1983). Nonetheless, all of the above evidence merely suggests that Erickson was a Griffies supporter who was terminated, not that she was terminated because she was a Griffies supporter.

When asked why she believed she was discharged from the prosecutor's office, Erickson replied as follows:

> The reason I feel I was discharged because I supported Mr. Griffies is the fact that I was discharged. I was given a list of reasons why I was being discharged. I didn't have an opportunity to meet and discuss those reasons. I was being discharged. So to me--excuse

> me, so to my belief I was only being discharged because of politically supporting Mr. Griffies.

A thorough reading of the trial transcript reveals no additional evidence of Ladenburg's motives other than that cited by the parties above. The evidence simply does not support Erickson's claim that her political support for Griffies during the election was a substantial or motivating factor in Ladenburg's decision to terminate her. We hold that Erickson failed to satisfy the second element of the Mt. Healthy test and that the district court erred by not granting Pierce County's motion for judgment notwithstanding the verdict. Consequently, we need not consider whether Ladenburg has satisfied the third element

of the Mt. Healthy test.

III.

Erickson claims that the district court erred by dismissing her due process claim prior to trial. A grant of summary judgment is reviewed de novo. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 1416, 1421 (9th Cir.1989), cert. denied, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). The appellate court's review is governed by the same standard used by the trial court under Fed.R.Civ.P. 56(c). Darring v.Kincheloe, 783 F.2d 874, 876 (9th Cir.1986). The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive

law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d. 1338, 1339-40 (9th Cir.1989).

Erickson claims that Ladenburg deprived her of liberty interest without due process. Essentially, Erickson argues that when Ladenburg said it was improper for her to retain a high salary after transferring to the family support department, she suffered injury to her reputation because Ladenburg's statement implied that she was dishonest. She contends she was prevented from securing other employment with Pierce County. The district court was correct in finding no violation of liberty interest. The remark concerning being overpaid does not rise to the level of violating a liberty interest.

In light of the Ninth Circuit and Supreme Court case law on point, it is

clear that the district court did not err in dismissing Erickson's due process claim. Roth v. Veteran's Admin.,856 F.2d 1401, 1411 (9th Cir.1988) (employer who implied that employee could not get along well with others and would make a poor manager did not violate employee's liberty interest because statements did not foreclose employee's ability to practice his profession); Stretten v. Wadsworth Veterans Hospital, 537 F.2d. 361, 366 (9th Cir.1976) (no due process violation when employer charged employee with incompetence and claimed employee could not get along with others since these charges would not prevent the employee from practicing medicine). Since Erickson was free to continue in her career elsewhere as an administrative secretary, and since she was not stigmatized to the

point where she could not find work, the district court properly dismissed her due process claim.

WE REMAND FOR ENTRY OF JUDGMENT IN FAVOR OF PIERCE COUNTY AND LADENBURG. REVERSED IN PART; AFFIRMED IN PART.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONNA ERICKSON, Plaintiff-Appellee, vs. PIERCE COUNTY; JOHN LADENBURG, Defendants-Appellant	)	No. 90-35212 D.C. No. CV-87-736-T
DONNA ERICKSON, Plaintiff-Appellant, vs. PIERCE COUNTY; JOHN LADENBURG, Defendants-Appellees	)	No. 90-35228 D.C. No. CV-87-736-JET ORDER

Appeal from the United States District Court for the Western District of Washington

Before: HUG, NOONAN, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX 3

AMENDMENT [I] [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise hereof; or abridging the freedom of speech, or of the pres; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Dec. 29, 1979, P.L. 96-170, Sec. 1, 93 Stat. 1284.)